INTERNATIONAL

JOURNAL OF ETHICS.

JULY, 1898.

THE NATIONAL ARBITRATION LAW.

THE act of Congress recently passed providing a system of arbitration in disputes between masters and employees in the railway industry is perhaps the most important legislation yet had in the United States, or any of them, upon the labor question. It was drawn by the Hon. Carroll D. Wright, Commissioner of Labor, and Hon. John D. Kernan, an associate with him on the Chicago Strike Commission, and had the further advantage of the advice and amendment of Secretary Olney, and the criticisms of the officers of various railway brotherhoods, the Federation of Labor, and other similar bodies. The law was evidently drawn after careful study of the various State laws providing for arbitration in general labor callings, but is distinctly more ambitious in scope, particularly as it makes an essay in the direction of meeting the abuses of equity process in labor disputes, *vulgò* "government by injunction." As a necessary consequence of all ambitious legislation, it will provoke criticism from the classes concerned, perhaps even from the courts, while it will probably meet with unqualified praise from the general public, who are interested, as citizens, in having the national government thus recognize the principles of conciliation and arbitration in labor disputes, and, as members of the travelling public, in having railway service orderly and uninterrupted by strikes.

Public criticism of the measure will probably be directed mainly to two points: first, that the arbitration proposed does not go far enough, in that it requires the initial consent of both parties to the dispute; second, that it goes too far in that the trade-union associations, though unincorporated, are recognized and erected into the position of the party controlling the dispute on behalf of the laborers, thus putting great power into their hands and almost forcing non-union employees, unless absolutely in the majority in any particular corporation, to join the union or association. Then the law will have to run the gauntlet, in at least one particular and possibly in two, of the Supreme Court. The weight of the first class of doubts cannot be determined until the law has gone into actual operation and arbitrations have been attempted under it with and without the consent of all the parties concerned, and the award or finding made, and the effect and value of such award fully tested; and it would be presumptuous to predict the decision of the Federal courts upon the constitutional doubts which the law will arouse. Nevertheless, it may be proper in explaining a measure to point out both how far it goes and where it falls short, and the reasons upon which those who do not like the law may resist its application in the courts.

In the first place, it is to be noted that the very existence of this act of Congress rests upon its power to regulate interstate commerce. It is not, and could not constitutionally be, an act providing generally for arbitration in labor disputes; and it applies to that branch of interstate commerce which is transacted by steam railways, not to the shipping interest nor to street railroads. It is, therefore, in a sense, class legislation, justified in spirit by the importance to the public of the proper management of railways, and in fact by that article of the Federal Constitution which gives Congress power to regulate commerce among the several States, which regulation, as the Federal courts have held, includes the instruments and instrumentalities of such commerce, among which are the persons employed as well as the articles and conveyances of transportation. We have, therefore, no constitutional objec-

tion on this point. If it is class legislation, it is class legislation of a kind made necessary, or at least made possible, by Section 8, Article I., of the Federal Constitution; and it must always be remembered that there is no express provision against class legislation in the Federal Constitution, except so far as may be read between the lines of the Fourteenth Amendment, though many of the State constitutions touch upon it.

Section 2 of the statute provides merely for conciliation: That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act and the employees of such carrier, the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, upon the request of either party to the controversy, put themselves in communication with the parties to such controversy, and use their best efforts, by mediation and conciliation, to amicably settle the same, and, failing such settlement, shall endeavor to bring about an arbitration in accordance with the provisions of this act. This section contains nothing new, but is substantially copied from the usual State labor arbitration laws; but the next section provides that when the controversy is not so settled it may be submitted to the arbitration of a board of three persons, one to be named by the employer, the other *by the labor organization to which the employees directly interested belong, or, if they belong to more than one, by that one of them which specially represents employees of the same grade and class and engaged in services of the same nature; and in all cases where the majority of such employees are not members of any labor organization said employees may, by a majority vote, select a committee of their own number, which committee shall have the right to select the arbitrator on behalf of the employees.* And the two thus chosen shall select the third commissioner of arbitration; but, in the event of their failure to name him within five days, the third arbitrator is named by the chairman of the Interstate Commerce Commission and the Commissioner of Labor. The submission (to such arbitration) shall be in writing, signed by the employer and by the labor organization representing the

employees, and shall stipulate that the board of arbitration commence its hearing within ten days, and file an award within thirty days from the date of appointment of the third arbitrator, and that pending the arbitration the status existing immediately prior to the dispute shall not be changed: *Provided, that no employee shall be compelled to render personal service without his consent.*

Most of the criticism in the debates in Congress was directed to this section. In the first place, the obvious comment was made that the law would never go into operation unless both parties to the dispute agreed to arbitrate; which they would not be likely to do if the chairman of the Interstate Commerce Commission and the Commissioner of Labor had previously failed in their efforts at conciliation; secondly, that to place the rights of the individual laborer in the hands of a labor "organization" in which he might possibly take no interest, was an unfair denial of his equal rights as a citizen; and, thirdly, that the last provision, that pending the arbitration the status existing immediately prior to the dispute should remain unchanged, was rendered nugatory by the provision immediately following that no employee should be compelled to render personal service without his consent. It will be seen that these criticisms are mutually destructive to some extent; but, to take them up in turn, we may note, as to the principal objection, that a compulsory arbitration is a contradiction in terms; and, more than that, no one, certainly not the labor classes themselves, has any desire for the same; but, on the contrary, they have a great dread of it. The point that parties who have failed to agree will not arbitrate, has been shown by the past history of such laws not to be the fact. The provision that the status previously existing should remain the same is enforceable by the very machinery of arbitration as against the trade organization, and through it against its members; and the point that the individual workman might at any point leave, or refuse to be bound by the same, is a most necessary provision for personal liberty, and goes somewhat to meet the other objection that his individual rights are taken from him by the act and placed in the hands of the trade-union.

The last abuse of "government by injunction," and one which would really justify the name, would be to place in the hands of any court of equity or board of arbitration the power to enforce the contract of personal service. Senator Rawlins, in opposing this bill in the Senate, used these words, "Those provisions which, without consulting the employee of the railroad company, undertake to clothe the leaders of the labor organization—so called in this act—which has no recognition in law, to bind him where the employee has not authorized that organization to submit any question with respect to his wages to arbitration, are an attempt by legislation to deprive the employee of his liberty or his property without due process of law." But it seems there is nothing in this objection. As the award cannot be enforced, nor the employee even compelled to go on with his contract of employment pending the arbitration, he has not been deprived of his liberty or property; on the contrary, his personal liberty is expressly safe-guarded. Senator Rawlins's other objection appears more serious: "We have a board of arbitration composed of one person named by the railroad company, the employer, another person not named by the opposite party to the contract, but by some person constituted, or attempted to be constituted, solely by an act of legislation, where there may be no actual authorization by the party concerned. Then the third is to be selected by these two, or, in default of such selection within five days, by a tribunal which we have created without any consultation with the parties concerned.

"Mr. President, it is said that this is an arbitration. It does not bear any features of an arbitration. It is an attempt, by an act of legislation, to create a tribunal independent of the consent and will of the parties, by which tribunal the employees of the railroad are to have settled for them their rates of wages, their hours of labor, and their conditions of employment." And Mr. Rawlins adds that there is no provision by which any employee whose wages may be reduced by the award which may be made by this arbitration, selected without any authorization or consent of his, may be given an opportunity to be heard before that tribunal; but the labor

leaders of an organization, created for an entirely distinct purpose, are given authority, without his consent, to go and present his case.

There is a good deal in this objection. In fact, if the act itself were entitled "a bill for the encouragement of labor organizations and to force all railroad employees to become members thereof," it would not be a misnomer. Moreover, these labor organizations are not necessarily chartered even by a State incorporation, still less by an incorporation under the United States trade-union statute. The law might perhaps have made it necessary, in order to take a hand in such an arbitration, for the labor organization to take out a charter under the Federal law; but it has not done so. The only protection the individual workman has under this bill is that if he is actually in a majority, he may take the arbitration out of the hands of the labor organization and conduct it directly by representatives of a majority of the employees; but we all know how difficult is individual action in such cases against any organization, however small and however unpopular. It has been a principal desire of students of the labor problem to get trade-unions to organize themselves in a responsible way so that they may make abiding settlements of labor disputes; but, in this country at least, they have hitherto preferred the freedom from responsibility and liability for their own contracts that an unchartered organization gives them. Then, again, why should Congress recognize a body having no legal existence, which has refused to come under its own laws? We cannot but think that the act is fairly open to criticism on this point. Certainly the effect of it would be to force all railroad men to come into a labor association, however unsatisfactory its methods and motives, and that without taking out a charter in the proper and legal way. Our laws have probably been unwise on the whole in recognizing by their machinery political parties, and the recognition of any body of persons styling themselves a labor organization may be attended with more unfair consequences still. Then again, if this "tribunal created independent of the consent and will of the parties" is really a court, individuals should have their

rights in it; and if not a court, what is it, and by what right does it issue what is substantially court process? But this point must be discussed later. "I can well understand," said Mr. Rawlins, "how certain labor leaders would desire to put this act through. They, like every other person, will arrogate to themselves as much power as they can. They desire to extend their influence and power over men who may compose those organizations, just as the railroad companies, so far as they think their interests will be advanced by it, desire to extend their influence and power over the organizations by means of the men who may be put in control of them. These labor leaders come here not in the interest of the men—the individuals whose rights are to be affected—but they come here asking Congress to vest in them the power to submit the rights of persons and the right of property of the membership of their organization to arbitration without their direction or authorization or consent. . . . The Supreme Court has decided that a business firm cannot submit to arbitration the rights of the members of the firm. . . . Favoring, as I do, individual liberty and the principle that no man ought to be deprived of any right unless he consents to it, and ought never to have any judgment affecting his right passed where he has no opportunity to be heard, . . . I shall be compelled to vote against the bill." We think one might fairly conclude that it would have been better to require the labor organizations to be incorporated and thereby also gain the advantage of being able, through the organizations, to control the members, and, to a certain extent at least, thereby carry out an award.

This brings up the next point of criticism. Section 3 goes on to say that the award, certified under the hands of the arbitrators, shall have the force and effect of a bill of exceptions, and shall be filed in the clerk's office of the circuit court of the United States, where it shall be final and conclusive upon both parties unless set aside for error of law. That shall be part of the stipulation for arbitration; and also "that the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity

so far as the powers of a court of equity permit: *Provided*, that no injunction or other legal process shall be issued which shall compel the performance by any laborer against his will of the contract for personal labor or service." This last provision is the most novel and important of the whole bill. The courts have usually interfered in labor disputes, in England at least, under the common law doctrine of conspiracy to injure the property rights or the liberty of another, though in this country the convenience and certainty of equity process, and the fact that nearly all our courts, even to the minor courts, have in many States been clothed with full equity power, has made it a more powerful remedy to proceed directly by injunction and contempt process rather than by fining individuals for combining to control their employers' business in an unlawful manner. Nevertheless, this section is directly aimed at "government by injunction," and provides just how far it shall be legal,—that is, implicitly, it provides that an injunction may be issued in accordance with the award of these arbitrators to any extent that does not actually enforce the performance by a laborer of his contract for personal service. Indirectly, of course, it has a tendency to deter the courts from issuing such injunctions until such an arbitration has been had; but that arbitration, once had, practically fixes the status of employment and allows the courts to award injunctions against disturbing it thereafter. Perhaps a simpler, certainly a more logical, method of arriving at the same result would have been to pass a simple statute declaring that a conspiracy to strike or persuade others to strike or to in any way control the employer in his business shall not be considered unlawful when the employer refuses to abide by the finding of the arbitrators created by this act. This, however, is a criticism rather of the machinery employed than of the substance and object of the statute.

Now what must the stipulation for arbitration contain on behalf of the employees? First, that employees dissatisfied with the award shall not, by reason of such dissatisfaction, quit the service of the employer before the expiration of three months after the making of such award without giving thirty days' notice in writing of their intention so to quit. As, how-

ever, the enforcement of the contract of personal service is expressly forbidden, this clause is a mere *brutum fulmen* except in so far as it may justify the employer in withholding wages from the person thus quitting. Secondly, that said award shall continue in force as between the parties thereto for the period of one year, and no new arbitration on the same subject between the same employer and the same class of employees shall be had until the expiration of one year from the award, if not set aside upon appeal to the court; and that, as to individual employees not belonging to the labor organization, the award shall not be binding unless they have personally given their assent in writing to become parties to the arbitration.

We do not think it can be argued that the award will entirely fail of effect. The great and important thing is, of course, public sentiment; and this undoubtedly will be fixed by it; but beyond this, the labor organization itself is bound in so far as it can control its members, and the individual employees may be bound if they have signed the agreement for arbitration. And, finally, it seems, though the statute is perhaps purposely cloudy on this point, that the effort to strike against the award, or for reasons not found substantial by the arbitration, may be enjoined by equity courts in the usual way, and the individual employee prevented from any further combination or refusal to abide by it except by actually and finally leaving the service. This, we think, amounts to a great deal, and we do not apprehend that the act will prove ineffectual on this point. It is much more probable that, as the award works perfectly against the railway corporation and at best only imperfectly as against the employees, the railway may refuse to go into it unless pretty certain of a favorable decision. But undoubtedly the law will have a great effect in preventing strikes pending determination of the question by the arbitrators, which, after all, is one of the main things to be desired.

Section 4 only provides for the filing of the award in the clerk's office of the circuit court, and for taking exceptions to the same upon which it may be set aside, but this only for

matter of law apparent upon the record, which can probably seldom happen. Section 5 is much more important. Copying the provisions of the Interstate Commerce Act itself, it provides that "the arbitrators, or either of them, shall have power to administer oaths or affirmations, sign subpœnas, require the attendance and testimony of witnesses, and the production of such books and papers material to the matters under investigation, and may invoke the aid of the United States courts to compel witnesses . . . to testify," etc. This section raises a great constitutional question; as Justice Field said, in his great decision in the Pacific Railway Commission Case,* "The Pacific Railway Commission . . . is not a judicial body; it possesses no judicial powers; it can determine no rights of the government, or of the companies whose affairs it investigates. . . . Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. . . . The provision of the act authorizing the courts to aid in the investigation in the manner indicated must, therefore, be adjudged void. The Federal courts, under the Constitution, cannot be made the aids to any investigation by a commission or a committee into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice in cases authorized by the Constitution."

This clause in the act undoubtedly relies upon the interpretation given by the Supreme Court to a similar provision in the Interstate Commerce Act in the case of Interstate Commerce Commission *v.* Brimson,† but even that case only goes to the length of holding that the Interstate Commerce Commission has a right to advise Congress, and for that purpose to gain the necessary information as one of the agencies of

* 32 Federal Reporter, 241.

† 154 United States, 447.

government. The arbitrators proposed in this act can hardly be said to be an agency of government. And even if the Brimson case covers it, it is worthy of note that in that case three judges dissented, and Justice Field himself took no part in the decision. A strong dissenting opinion was rendered by Mr. Justice Brewer,* in which the Chief Justice and Mr. Justice Jackson concurred; and it would seem very probable that Mr. Justice Field's reasoning would have led him to dissent also, which would have made four dissenting judges out of nine. Unless the cases are exactly identical, therefore, the authority of the Brimson case can hardly be considered conclusive, and the question in this act will have to be decided *de novo* by the Supreme Court before we can be sure that the provisions of Section 5 will be enforced, should either side object to an examination of what they may deem their private affairs.

Section 6 provides for arbitrations to which the employees are individual parties instead of being represented by a labor organization; but in such case a majority of all employees in the service of the same employer and of the same grade and class must consent to the arbitration before the machinery is put in motion.

Section 7 provides that during the pendency of arbitration under this act, it shall not be lawful for the employer to discharge the employees except for inefficiency, violation of law, or neglect of duty; nor for the labor organization to order, nor for the employees to unite in, aid, or abet strikes against said employer; nor during a period of three months after an award under such an arbitration, for such an employer to discharge any such employees, except for the causes aforesaid, without thirty days' written notice; nor for any such employees, during a like period, to leave the employer's service without just cause, without giving similar notice; nor for the labor organization to order, counsel, or advise otherwise: *Provided*, That nothing herein shall prevent any employer from reducing the number of its employees whenever its business necessities require it.

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* 155 United States, 1.

It hardly needs saying that this section is full of loopholes. In the first place, no remedy is given the employer but a suit for damages, which is usually valueless as against the individual employee; while, on the employer's side, who is to determine whether he discharges an employee for "inefficiency or neglect of duty"? And as for the prohibition against uniting or aiding in strikes, the act expressly says that each individual may leave his employment at any time, and it would be impossible to prove that a simultaneous leaving by all the employees amounted to the uniting in a strike; while, on the employer's side, again, if all other loopholes fail, he can always reduce the number of his employees, because, in his judgment, business necessities require it.

The next section, though much criticised in the Senate, would seem to be a wise one. It provides that in every future incorporation of a trades-union under the national law, it must be provided that a member shall lose his membership by participating in or by instigating force or violence during strikes, etc., or by seeking to prevent others from working through violence or threats. One might wish that the law had gone even further, and provided that an organization should lose its charter, if incorporated, when it failed to abide by an award, or failed to expel any of its members for not abiding by any award made under this act. This would not be going so far as to prohibit any labor organization from controlling an arbitration under the act unless incorporated under the Federal law, while it would have secured some of the benefits of such a provision.

Section 9 provides, and properly, that employees upon railroads in the hands of a receiver shall have the right to be heard in the court appointing the receiver upon all questions concerning the terms and conditions of their employment, and that no reduction of wages shall be made by the receivers without the authority of the court after due notice. But Section 10, although it copies the provisions of the statutes of several States is, if not of doubtful constitutionality in a Federal statute, at least of doubtful propriety. One State supreme court already has declared such a law unconstitutional. It

provides that no employer subject to the provisions of this act shall require any employee not to join any labor corporation, association, or organization, or shall discriminate against him because of his membership in such an association, or shall require as a condition of employment that he shall stay out of any such association, or that he shall agree to contribute to any fund for charitable, social, or beneficial purposes; with other provisions against releasing the employer from legal liability for personal injuries, which are more reasonable than the above, as well as a prohibition of blacklisting. This section opens altogether too large a subject to discuss in this article. The question of restricting an employer from engaging whom he likes and discharging whom he does not like, is a very large one, and goes very near the necessary liberty of the citizen, be he person or corporation. There will doubtless be much litigation upon such statutes in the next few years.

Enough has been said to justify the position with which this article started, that this act of Congress is a most important one; that it goes further, and is more comprehensive than any previous act on similar subjects; and that its actual working will be watched with the greatest interest by all thoughtful citizens. It has not been sought by these criticisms to question the propriety or policy of the act, but it is a statute which will require the active sympathy and agreement of both sides to bring about the good that may result from the same if taken fairly by both parties and applied in sympathy with its objects, and with a hearty desire to carry them out. The very word "arbitration" imports a mutual consent to the submission, and that consent should go not only to the initial submission to arbitration, but must accompany the proceeding through all its phases with willingness to give full testimony and information to the arbitrators in making the award, and with an honest and permanent intention to abide by the same when rendered. If taken in a litigant spirit, the whole matter becomes an ordinary legal controversy, and might well be conducted by an ordinary court, which method would indeed have removed many of the constitutional objections. The

future of the law, therefore, depends entirely on the spirit in which it is taken. The previous statute, which this supersedes, the act of October 1, 1888, does not seem to have been a success in the working, at least we can find no evidence that such has been the case. It is true that this act merely provided for the filing of the award with the Commissioner of Labor, and made no effort to affect the powers of equity courts even indirectly, nor to control the action of the parties to the arbitration either pending the award or after it. The last word of the whole subject must be that arbitrations are in their nature voluntary, and derive their full powers from the consent of the parties submitting, and that the only constitutional machinery for *enforcing* a judgment or decree must still be that of a *court*, into which either or both parties may be dragged against their will. Whenever a trade dispute does not embody a legal injury, there is nothing cognizable by a court, and the only remedy must come from the reason of the parties themselves after a full discussion re-enforced by the public sentiment which a public discussion necessarily creates. It is to the fairness of the parties to railway disputes, and the interest of the public in the fair treatment of a large class of its members, that we must look for a successful operation of this law. The statute will succeed with its friends and fail among its enemies.

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